No. 90-45

In The

Supreme Court of the United States

October Term, 1990

HOFFMANN-LA ROCHE INC.,

Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondents Jimmy S. Durham, Jerry W. Durham and Judy C. Durham respectfully request that this Honorable Court deny the Petition for Writ of Certiorari seeking review of the Eleventh Circuit's order in this case entered on 2 February 1990.

STATEMENT OF THE CASE

The Petition for Writ of Certiorari requests review of the propriety of the Eleventh Circuit order denying a writ of mandamus to the United States District Court for the Northern District of Alabama. The trial court's order at issue compelled production to Plaintiffs Jimmy S. Durham, Jerry W. Durham and Judy C. Durham (Plaintiffs) of adverse experience reports (ADRs) with the identities of reporting physicians but allowed for the redaction of patient names.

On or about 14 December 1988, the Plaintiffs commenced an action against Hoffmann-LaRoche, Inc. (Petitioner or Roche) for damages resulting from injuries suffered by Jimmy S. Durham as a result of his ingestion of the prescription drug Accutane. As discovery proceeded, Plaintiffs encountered difficulty in obtaining the documents requested. By order of the United States District Court for the Northern District of Alabama, entered on 13 July 1989 after briefing and oral argument, Roche was instructed to produce copies of all ADRs regarding depression and substantially similar adverse reactions which had been reported to Petitioner regarding Accutane and which it had thereafter transmitted to the Food & Drug Administration (FDA) pursuant to its reporting requirements under federal regulations. Said order prohibited Petitioner from redacting the names and addresses of the reporting physicians, but permitted redaction of the names of the patients and any identifying information regarding them. Nevertheless, Petitioner produced copies of the requested ADRs with said physician names and addresses redacted, and thereafter filed a Motion to Reconsider the trial court's prior order. After

hearing oral argument on the Motion to Reconsider, the District Judge denied that motion. Roche then filed a Petition in the Eleventh Circuit Court of Appeals requesting a Writ of Mandamus.

Roche based its Motion for Reconsideration and its Petition for Writ of Mandamus on FDA regulations which apply specifically to the FDA, not to the manufacturer; on cases which are factually distinguishable; and on a public policy argument. Only after the Eleventh Circuit's denial of its Petition for Writ of Mandamus did the Petitioner allege that the trial court had failed to balance the relevant interests of the parties. Throughout this discovery dispute, the Plaintiffs have asserted their legitimate right to discover information which may lead to evidence on the effectiveness of the warning given by Roche regarding Accutane and which may reveal the identities of physicians who have made multiple reports on numerous patients and who, therefore, have considerable expertise regarding the adverse effects of Accutane.

The Plaintiffs' foremost need is to prepare their case for trial. In other litigation, the Petitioner has taken the position that only physicians who are familiar with the drug are properly qualified to assess the adequacy of the warnings given. A highly contested issue in this case is the adequacy of the warning given to Jimmy S. Durham's prescribing physician when Accutane was prescribed for him. Cause-in-fact is also highly contested. The Petitioner maintained, in response to a legitimate request for discovery, that no 30(b)(6) deponents would be put up to address the causation issue because no one at Roche has any knowledge regarding how Accutane causes depression or like conditions, and the Petitioner has stated that

it has no reason to believe that Accutane does cause such conditions.

The ADRs are of critical importance to the Plaintiffs' case. On brief and in oral argument held on at least two separate occasions, the Trial Judge was presented with facts, as well as the needs and concerns of both parties, upon which to base his decision. Because the Plaintiffs have reason to anticipate an argument by the Petitioner that all similar events must be demonstrably substantially similar in order to be considered as evidence of causation in the trial of this matter, making available the physicians' names where the patient identifying information has been deleted is absolutely essential in order to fully develop the facts of those other similar events. Most of the ADRs are very brief reports of information elicited from treating physicians by employees of the Petitioner and submitted to the FDA on report forms supplied by that agency. Very few have attached detailed medical records and most have very little follow-up. Therefore, the ADRs are easily attacked by the manufacturer and are excludable from use in the trial of the case unless fully developed. Ironically, these reports, which the Petitioner now argues are critically important to the health and safety of the public in general, will no doubt be attacked as unreliable at the time of trial.

REASONS FOR DENYING THE WRIT

I. THE CONFLICT WHICH THE PETITIONER ALLEGES EXISTS BETWEEN THE ELEVENTH CIRCUIT'S DECISION AND DECISIONS IN ALL OTHER CIRCUITS REQUIRING THAT A DISTRICT JUDGE, IN RESOLVING A DISCOVERY DISPUTE PURSUANT TO RULE 26 OF THE *FEDERAL RULES OF CIVIL PROCEDURE*, BALANCE THE RELEVANT INTERESTS OF THE PARTIES IS NOT A CONFLICT BECAUSE THE HONORABLE SEYBOURN H. LYNNE, THE TRIAL JUDGE BELOW, *DID* BALANCE THE RELEVANT INTERESTS OF THE PARTIES.

The Petitioner argues that the Trial Judge, in ordering the redaction of patient names but permitting the disclosure of physician names on the ADRs produced to the Plaintiffs, gave *no* weight to the public interest in the confidentiality of such information. There is absolutely no basis for this allegation. The Petitioner seems to argue that because the balancing did not result in a protective order encompassing all the points the Petitioner urged the court has somehow abused its discretion. As noted in *Farnsworth v. Proctor & Gamble Co.*, 758 F.2d 1545 (11th Cir. 1985), the Federal Rules of Civil Procedure strongly favor full discovery whenever possible. "[T]he Federal Rules permit the broadest possible scope of discovery and leave it to the enlightened discretion of the District Court to decide what restrictions may be necessary in a particular case." Wright & Miller, *Federal Practice and Procedure, Civil* § 2036 at 268. *Deitchman v. E. R. Squibb & Sons, Inc.*, 740 F.2d 556, 566 (7th Cir. 1984). *Also see* 26(b)(1) *Fed.R.Civ.P.*

The Petitioners sought relief in the trial court in the nature of a protective order for which Rule 26(c) of the

Federal Rules of Civil Procedure articulates the standard. A protective order may be granted where "good cause" is demonstrated by the proponent of the order. However, the federal courts have required a balancing of interests approach to the rule. *Farnsworth v. Proctor & Gamble Co.*, 758 F.2d 1545 (11th Cir. 1985). Once the proponent of the protective order meets his burden of demonstrating good cause, the trial court's only duty is to balance the relative interests of the parties. While every circuit has held that a Rule 26 motion requires a balancing of the relevant interests, no court has ever ruled that a mere showing of good cause gives the proponent of a protective order the clear and indisputable right to such an order.

The Eleventh Circuit's decision does not result in a conflict among the circuits as alleged by the Petitioner. It should go without saying that this balancing of interests approach validated by all of the federal circuits results in a determination based upon the unique facts of each case. While the procedure itself is mandated by Rule 26 and the decisions of the various circuits, no specific outcome is mandated. The Petitioner cites to numerous cases where discovery was withheld, but not one of those cases holds that discovery *must* be denied. Rather, the cases uniformly hold that where balancing was performed by the trial court discovery *could* be denied under the particular facts presented, i.e. each of the decisions is entirely fact-bound. The Petitioner also cites to *Newsom v. Breon Laboratories, Inc.*, 709 S.W.2d 559 (Tenn. 1986) wherein the Supreme Court of Tennessee validated discovery of reporting physicians' names by plaintiffs. Such a discretionary discovery ruling should not be disturbed, even on

appeal, unless it is clearly erroneous or unless no evidence rationally supports the decision. *Farnsworth v. Proctor & Gamble Co.*, 758 F.2d 1545 (11th Cir. 1985). Obviously, the Trial Judge is in the unique position of being able to weigh the competing interests in an ongoing case assigned to his responsibility. And, the review authority of the appellate courts, especially in routine discovery matters which turn on the specific facts of the case, should be and is quite limited. *See Deitchman v. E. R. Squibb & Sons, Inc.*, 740 F.2d 556, 563 (7th Cir. 1984).

The Trial Judge permitted briefing regarding the law and the unique facts of this case and heard oral argument prior to entering his order protecting only the patient names from disclosure. Thereafter, in response to the Petitioner's Motion to Reconsider, the Trial Judge once again heard oral argument before denying the motion. The interests of both parties to this action were clearly before the court throughout this process. The interests were balanced by the Trial Judge. Therefore, there is no conflict among the circuits and no basis in the facts of this case to substantiate the Petitioner's allegation that the trial court erred in any way or that the Eleventh Circuit consequently erred in denying the Petition for Writ of Mandamus.

II. BECAUSE THE DISCOVERY ORDER BELOW INVOLVED THE PROPER EXERCISE OF JUDICIAL DISCRETION, WHICH WAS NOT ABUSED, THE PETITIONER HAS NOT AND CANNOT DEMONSTRATE AN INDISPUTABLE, CLEAR RIGHT TO THE RESULT SOUGHT, MAKING THE DENIAL OF THE EXTRAORDINARY WRIT OF MANDAMUS UNDER THE FACTS OF THIS CASE PROPER.

As the United States Supreme Court held in *Kerr v. United States District Court for the Northern District of*

California, 426 U.S. 394, 402, 96 S.Ct. 2119, 2123, 48 L.Ed.2d 725 (1976), the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. Only exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy. *Will v. United States*, 389 U.S. 90, 95, 88 S.Ct. 269, 273, 19 L.Ed. 305 (1967). *Also see Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 30, 101 S.Ct. 188, 66 L.Ed.2d 193 (1980); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 74 S.Ct. 145, 98 L.Ed. 106 (1953). In *In re Fink*, 876 F.2d 84 (11th Cir. 1989), the court clearly noted that mandamus is available *only* in exceptional situations. Mandamus, being an extraordinary remedy, may issue properly only where three elements co-exist. The Petitioner must demonstrate a clear right to the relief sought; there must be a clear duty on the part of the party to whom the mandamus is directed; and, there can be no other adequate remedy. *District Lodge No. 166, International Association of Machinist and Aerospace Workers v. TWA Services, Inc.*, 731 F.2d 711 (11th Cir. 1984).

An abuse of judicial discretion, justifying review on mandamus is not shown unless discretion was exercised on a ground or to an extent clearly untenable or manifestly unreasonable; and if such exercise is not shown the court's action will not be disturbed. *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949 (8th Cir.), *cert. denied*, 441 U.S. 907, 99 S.Ct. 1997, 60 L.Ed.2d 376 (1979). Where a matter is committed to the sound discretion of the court, it cannot be said that a litigant's right to a particular result is "clear and indisputable". Therefore, a writ of mandamus will only be granted where the court's discretion

has been exercised if there is a clear error of law. *Allied Chemicals Corp. v. Daiflon, Inc.*, 449 U.S. at 36.

The rule is firmly and universally established that mandamus cannot be used to challenge ordinary discovery orders. *City of Cleveland v. Krupansky*, 619 F.2d 572 (6th Cir.), *cert. denied*, 449 U.S. 834, 101 S.Ct. 106, 66 L.Ed.2d 40 (1980). In *In re Diamond Shamrock Chemicals Co.*, 725 F.2d 858 (2nd Cir.), *cert. denied*, 465 U.S. 1067, 104 S.Ct. 1417, 79 L.Ed.2d 743 (1984), the court noted that mere error, even gross error in a particular case, as distinguished from a calculated and repeated disregard of governing rules, does not suffice to support issuance of a writ of mandamus. In *In re Underwriters at Lloyd's*, 666 F.2d 55, 57 (4th Cir. 1981), the court held that where the district court had made factual determinations which operated to defeat the petitioner's claim of privilege, and because such findings were binding upon the appellate court, unless clearly erroneous, such a petition must fail.

It is not sufficient that a decision of the lower court was wrong or even grossly wrong, because "[m]andamus, it must be remembered, does not 'run the gauntlet of reversible errors.' *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 382, 74 S.Ct. 145, 147 (1953). Its office is not to 'control the decision of the trial court,' but rather merely to confine the lower court to the sphere of its discretionary power." *Id.* at 383. *Will v. United States*, 389 U.S. at 104.

In *Barclaysamerican Corp. v. Kane*, 746 F.2d 653 (10th Cir. 1984), discovery of various documents was at issue and the party opposing discovery asserted privilege. The appellate court, likening the case unto *Will v. United*

States, supra, noted that the trial judge had carefully considered the applicability of the privilege asserted and even if he erred in ruling on this matter, within his jurisdiction, neither the extraordinary writ of prohibition or mandamus was appropriate. The court stated that although a simple showing of error may suffice to obtain reversal on direct appeal, a greater showing must be made to obtain a writ of mandamus. *Id.* at 655. *Also see Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 30, 101 S.Ct. 188, 66 L.Ed.2d 193 (1980). Hence, even though the district court enjoys broad discretion over discovery matters and will be reversed on appeal only for abuse of discretion, on petition for writ of mandamus the standard is even higher.

The Petitioner asserted privilege, specifically physician/patient privilege, as the primary basis upon which it alleged that the Trial Judge erred in his discovery ruling. Under Rule 501 of the *Federal Rules of Evidence* the privilege of a witness is determined in accordance with state law in diversity cases such as this. 28 U.S.C. § 1652 is in accord. In a diversity action, state law governs the privileged nature of materials sought in discovery. *See In re Fink*, 876 F.2d 84 (11th Cir. 1989); and, *Somer v. Johnson*, 704 F.2d 1473 (11th Cir. 1983). There is no physician/patient evidentiary privilege in federal court proceedings except with respect to an element of a claim or defense as to which state law supplies the rule of decision. *United States v. Meagher*, 531 F.2d 752 (5th Cir.), *cert. denied*, 429 U.S. 853, 97 S.Ct. 146, 50 L.Ed.2d 128 (1976). Neither Tennessee (the Plaintiffs' home state) nor Alabama (the forum state) recognizes a physician/patient evidentiary privilege. *State v. Fears*, 659 S.W.2d 370 (Tenn.Crim.App.

1983); *Quarles v. Southerland*, 389 S.W.2d 249 (Tenn. 1965); *Horne v. Patton*, 291 Ala. 701, 287 So.2d 824 (1973); *Duncan v. State*, 473 So.2d 1203 (Ala.Crim.App. 1985); *Drake v. Covington Board of Education*, 371 F.Supp. 984 (M.D.Ala. 1974). Therefore, the Trial Judge was acting clearly within his discretion in assigning little or no weight to this argument advanced by the Petitioners.

In *Kerr v. United States District Court for the Northern District of California*, 511 F.2d 192 (9th Cir. 1975), the petitioners, being dissatisfied with the district court's order regarding discovery of documents the petitioners claimed to be privileged, sought a writ of mandamus or prohibition under 28 U.S.C. § 1651. The petitioners relied upon federal statutory law, the Freedom of Information Act, 5 U.S.C. § 552, to sustain their asserted privilege. The court there noted that the purpose of the Freedom of Information Act was to expand the access of the public to official records of federal agencies, subject to stated exceptions, and that such exceptions were not intended to create evidentiary privileges for civil discovery. *See Verazzano Trading Corp. v. United States*, 349 F.Supp. 1401 (Cust.Ct. 1972); *Pleasant Hill Bank v. United States*, 58 F.R.D. 97 (W.D. Mo. 1973); *Hodgson v. GMAC*, 54 F.R.D. 445 (S.D.Fla. 1972). The court went on to note that the exceptions under § 552 were intended only to permit the withholding of certain types of information from the public generally. *Kerr v. United States District Court for the Northern District of California*, 511 F.2d 192, 198 (9th Cir. 1975), *aff'd*, 426 U.S. 394, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976).

Petitioner argued in the trial court that it is somehow bound by the federal regulations applicable to the FDA

and by the Freedom of Information Act to withhold the requested physicians' names. As noted in *Kerr v. United States District Court for the Northern District of California*, 511 F.2d 192, 197 (9th Cir. 1975), the Freedom of Information Act cannot be used to block the normal course of court proceedings such as court ordered discovery, and the Act does not establish any discovery privilege in litigation not involving the United States. The very language of the Act limits it to authorities of the Government of the United States. *Id.* at 197; 5 U.S.C. § 551(1). Furthermore, exemptions to the Freedom of Information Act have been interpreted to be merely permissive not mandatory and even agencies for which the Act is applicable are free to establish more liberal disclosure policies. *GTE Sylvania, Inc. v. Consumer Products Safety Commission*, 598 F.2d 790 (Del. 1979), *aff'd*, 447 U.S. 102, 100 S.Ct. 2051, 64 L.Ed.2d 706 (1979). Exemptions under the Act merely remove certain classes of information from the otherwise mandatory disclosure requirement. Therefore, even governmental agencies are permitted to disclose exempt materials. *St. Joseph's Hospital Health Center v. Blue Cross of Central New York, Inc.*, 489 F.Supp. 1052 (D.C.N.Y. 1980).

The FDA has promulgated regulations governing its own disclosure of ADRs and the information contained therein. While the Petitioner relies upon 21 C.F.R. § 20.111 as a basis for withholding the ordered discovery, it ignores the plain language of that section which reads:

> The provisions of this section shall apply only to data and information submitted voluntarily to the Food & Drug Administration . . . and not as a part of any petition, application, master file, or other required submission or request for action.

While § 20.111 does permit the FDA to redact physicians' names before releasing ADRs to the general public, this section clearly has no application to the Petitioner. Even if the section were applicable, the Petitioner ignores the companion section, 21 C.F.R. § 20.83(a), which mandates that the FDA make available for public disclosure such information "in compliance with a final court order requiring such disclosure." Thus, the Petitioner is unable to demonstrate a "clear and indisputable right" to the protective order in its totality which it sought in the trial court below.

The Petitioner's allegation that the FDA adverse experience reporting system is placed in serious jeopardy because of one discretionary discovery ruling, based entirely upon the unique facts of this case, is essentially unfounded. Roche relies upon the sheer speculation of one FDA employee regarding the possible effect of this one ruling below upon the public health and welfare. Based upon this employee's letter (Appendix C to the Petition), the Petitioner speculates that the limited disclosure ordered *may* lead to a *hesitancy* on the part of physicians to contact the manufacturer regarding problems with the drug and that the potential to chill the free flow of information among physicians will in turn jeopardize the FDA's "mission" to protect the public health. (Petition at 13). This argument ignores the fact that physicians contact the drug manufacturer not because of an implied promise of confidentiality but because they need information to aid in the treatment of their patients. The same letter to which the Petitioner refers clearly states that the objective of the FDA is the free flow of information and protection of the public health. A public policy

argument can, therefore, likewise be made by the Plaintiffs that the discovery order below does, in fact, promote the free flow of information regarding the adverse effects of Accutane and in turn promotes the responsibility of the manufacturer to the public which consumes its product and is sometimes injured thereby. The FDA's "mission", i.e. the protection of the public health and welfare, is in turn promoted by disclosure in certain cases. Nevertheless, it was the duty of the trial court to weigh these competing interests, which it did. Based entirely upon the unique facts of this case, disclosure is consistent with public policy and clearly warranted. However, because this is a fact specific determination, it has little or no application to other discovery disputes, making this order which is not outcome determinative inappropriate for review by this Court at this time. There is simply no important issue presented for review here and no extraordinary circumstances are presented which should cause this Court to depart from its usual practice of denying interlocutory review.

The Petitioner argued that if the physicians' names were revealed they would be subjected to "unlimited ex parte contact." However, Roche ignored the obvious in that these physicians have the opportunity to consult with their patients and then consent or decline to discuss the matter further. If the Plaintiffs were not given the opportunity to make such contact they would be relegated to accepting the comments provided to Roche employees by the reporters with no independent means to investigate or substantiate the validity of the information stated on the ADRs because this information is not available from any other source. The Petitioner, who has a

vested interest in the continued marketing of its drug, is the only entity who generally has direct contact with the reporting physician and is in the position of being able to "control" the content of the ADRs by the questions asked of the physicians and the nature of the information elicited from and given to the physicians. Substantial similarity between the events experienced by the patients reported to Roche and Jimmy Durham in this case is difficult to demonstrate under such circumstances. Because there have been no epidemiologic studies conducted on Accutane relevant to its propensity to cause depression or similar adverse experiences, the development of information from these reports is critical to the Plaintiffs' proof of causation.

The Petitioner's argument that the information contained in the ADRs is extremely important to the FDA in its monitoring function and to Roche and the public because its analysis provides early warnings of previously unknown risks, theoretically sounds persuasive. However, the Petitioner articulated no objective standards or criteria for evaluating this data. Furthermore, its reliance upon a letter from an FDA employee replete with speculation and no substantive data simply does not outweigh the Plaintiffs' need to prepare their case. Rather than the stated altruistic purpose of preserving confidentiality, the Plaintiffs suspect that the Petitioner desires to withhold this vital information from the Plaintiffs simply for the self-serving purpose of protecting its drug from successful attack. The Plaintiffs' compelling need when balanced against the Petitioner's speculative assertions regarding potential abuse quite clearly supports the decision below. The Petitioner cited the court to 39 Fed.Reg.

44628-29 (December 24, 1974) in support of its argument for non-disclosure. However, in that same volume of the Federal Register, at 44602, reference was made to the concern that the "open disclosure policy" set out in proposed regulations would increase product liability and other litigation problems for companies. In response, the Commissioner commented that such a concern would not be a factor in setting policy regarding disclosure of information under the Freedom of Information Act.

Petitioner cites no authority which dictates an obligation incumbent upon *it* not to make the disclosures which it sought below to avoid. In *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78, 82 (E.D.N.Y. 1975), the court stated "[t]here are more than private issues at stake in this litigation. When a case involves a potentially dangerous drug, the public interest may well be served by the revelation of all pertinent information to the triers . . . it may be particularly important to admit relevant evidence in an effort not only to compensate for past injury or death but to prevent future personal tragedies." In *Centurion Industries, Inc. v. Warren Steurer and Associates*, 665 F.2d 323 (10th Cir. 1981), the court noted that even trade secrets may be disclosed when the need for the information outweighs the harm of the discovery, citing to *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 99 S.Ct. 2800, 61 L.Ed.2d 587 (1979).

As the circuit court noted in *Deitchman v. E. R. Squibb & Sons, Inc.*, 740 F.2d 556, 563 (7th Cir. 1984), in reviewing discovery requests the clear abuse of discretion standard applies and the relevant inquiry under the standard is *not* how the reviewing judges would have ruled if they had been considering the case in the first place, but rather,

whether any reasonable person could agree with the district court. Where substantial need is shown, even confidential materials may be revealed. *Id.* at 565. *Also see Harris v. Upjohn Co.*, 115 F.R.D. 191, 192 (S.D. Ill. 1987); *Heat & Control, Inc. v. Hester Industries, Inc.*, 785 F.2d 1017 (Fed. Cir. 1986) (wherein the court held selective disclosure of information which *could* be protected is not per se error). As the court noted in *Kaufman v. Edelstein*, 539 F.2d 811, 819 (2nd Cir. 1976), jurisdiction is the authority to decide a case either way, citing *The Fair v. Kohler Die Co.*, 228 U.S. 22, 25, 33 S.Ct. 410, 411, 57 L.Ed. 716 (1913).

The facts clearly illustrate that the Petitioner has no "clear and indisputable" right to the results sought in the trial court. Therefore, the Eleventh Circuit correctly denied the Petition for Writ of Mandamus and review by this Court is unwarranted. The Petition for Writ of Certiorari is due to be denied.

III. SUMMARY REVERSAL IS NOT APPROPRIATE UNDER THE FACTS ASSERTED BY THE PETITIONER.

Summary disposition is the appropriate use of the Court's power to grant certiorari and reverse the decision of the court of appeals below *only* if the decision below constitutes clear error. The clearly erroneous standard has not been met in this case, however. Petitioner bases its request for summary reversal on its erroneous assertion that the Trial Judge failed to balance the relevant interests of the parties. The Petitioner cites no other basis for summary reversal, and, indeed, none exists.

As the Petitioner concedes, a case is appropriate for summary disposition when the relevant law is settled and stable (and has been violated); the facts are not in dispute; and the decision below is clearly in error. *Schweiker v. Hansen*, 450 U.S. 785, 791, 101 S.Ct. 1468, 1472, 67 L.Ed.2d 685 (1981) (Marshall, J., dissenting). None of these requirements are met in the instant case. While balancing is required, it was performed. The Petitioner points to no other statutory or case law which would entitle it to summary reversal. Additionally, the pertinent facts are highly disputed and the decision below was appropriately made pursuant to the discretionary authority of the Trial Judge after giving the parties ample opportunity to argue their respective positions and after balancing the relevant interests of the parties. None of the requirements having been met, summary reversal is clearly inappropriate.

Furthermore, as Justice Marshall, dissenting in *Rhodes v. Stewart*, 109 S.Ct. 202, 204 (1988), stated:

> I continue to believe that it is unfair to litigants and damaging to the integrity and accuracy of this Court's decisions to reverse a decision summarily without the benefit of full briefing on the merits of the question decided. *Buchanan v. Stanships*, 485 U.S. ___, ___, 108 S.Ct. 1130, 1132, 99 L.Ed.2d 289 (1988) (MARSHALL, J., dissenting); *Commissioner v. McCoy*, 484 U.S. ___, ___, 108 S.Ct. 217, 219, 98 L.Ed.2d 2 (1987) (MARSHALL, J., dissenting); *Montana v. Hall*, 481 U.S. 400, ___, 107 S.Ct. 1825, 1827, 95 L.Ed.2d 354 (1987) (MARSHALL, J., dissenting).
>
> The Rules of this Court urge litigants filing petitions for certiorari to focus on the exceptional need for this Court's review rather than

on the merits of the underlying case. Summary disposition thus flies in the face of legitimate expectations of the parties seeking review by this Court and deprives them of the opportunity to argue the merits of their claim before judgment. Moreover, briefing on the merits leads to greater accuracy in our decisions and helps this Court to reduce as much as humanly possible the inevitable incidence of error in our opinions. Finally, the practice of summary disposition demonstrates insufficient respect for lower court judges and for our own dissenting colleagues on this Court.

It is my view that when the Court is considering summary disposition of a case, it should, at the very least, so inform the litigants and invite them to submit supplemental briefs on the merits.

CONCLUSION

For the foregoing reasons this matter clearly does not warrant review and the Petition for Writ of Certiorari should be denied.

DATED 30 July 1990.

Respectfully submitted,

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